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IN THE

Supreme Court of the United States

71-791

EUGENE H. ROMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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Wheeling, West Virginia

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PETITION FOR WRIT OF CERTIORARI

Reference of Opinions:

(1) *United States v. Roman,* F.2nd (4th Cir., 1971) decided November 17, 1971.

(2) *United States v. Roman,* Memorandum Order, dated January 20, 1971.

Grounds on which Jurisdiction Is Invoked:

(1) Judgment Sought to be Reviewed:

Judgment Order of the United States Court of Appeals for the Fourth Circuit, dated November 17, 1971.

(2) Statute Conferring Jurisdiction:

States Supreme Court:

(a) 28 U.S.C. 1254: Court of Appeals; Certiorari; Appeal; Certified questions:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

Question Presented for Review

Does the "Affidavit for Search Warrant" sufficiently establish probable cause to issue a search warrant.

Constitutional Provisions Involved:

Amendment to the Constitution of the United States

Amendment IV — Searches and Seizures

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable

searches and seizures, shall not be violated, and no warrants shall issue, but for probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the things to be seized.

Statement of Case

On September 16, 1970, a search warrant was issued by a United States Commissioner for an automobile located at the residence of the petitioner. As a result thereof the petitioner was arrested.

On December 8, 1970, the Grand Jury returned an indictment against the petitioner in violation of title 18, section 2313, United States Code.

By Order granted January 20, 1971, the United States District Court granted the petitioner's Motion to Suppress the search warrant holding the affidavit insufficient to support the writ for failure to meet the Fourth Amendment's requirement of probable cause, Appendix page 10.

On February 3, 1970, the District Court consented to reconsider its ruling upon the United States oral motion. On February 24, 1970, the District Court again found the affidavit to be inadequate. The United States appealed from this order to the United States Court of Appeals for the Fourth Circuit.

On June 11, 1971, the Court of Appeals heard argument on the appeal and on November 17, 1971, vacated the District Court's order discharging the warrant. It is from the November 17, 1971, judgment that review is sought by the petitioner, Appendix page 6.

ARGUMENT

Without being presumptuous this Court has continually been concerned with the constitutional requirements for obtaining a search warrant. This Court set forth in *Aquilar v. Texas*, 378 U.S. 108 (1964) the final test as to what is required in an affidavit so as to show what is required for probable cause. *Spinelli v. United States*, 393 U.S. 410 (1969) followed to further explain the principles of *Aquilar*.

The District Court in this case followed the requirements of *Aquilar* and found the affidavit to be inadequate. The Circuit Court of Appeals apparently refused to recognize the *Aquilar* requirements and vacated the order sustaining the motion to suppress.

The pertinent sections of the affidavit read as follows:

> And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
>
> (1) The aforesaid 1970 Chevrolet automobile, VIN 13637OA119308, was reported stolen in Pittsburgh, Pennsylvania, on or about March 17 or 18, 1970.
>
> (2) In July, 1970, a responsible citizen reported to an agent of the Federal Bureau of Investigation, Cincinnati office, that one Gene Roman endeavored to obtain an Ohio Certificate of Title for the 1970 Chevrolet automobile, VIN 136370OA119308, reportedly stolen as stated aforesaid.
>
> (3) An officer of the Police Department of the City of Wheeling, Ohio County, West Virginia, reported that he saw the back end of a 1970 Chevrolet automobile in the garage of the house located at 889 Ivy Avenue, Wheeling, West Virginia.
>
> (4) The Wheeling City Directory lists that Eugene H. Roman is a resident of the premises situated at 889 Ivy Avenue, Wheeling, West Virginia. [Numbers added.]

This Court in *Aquilar v. Texas*, 378 U.S. 108 (1964) set forth the two requirements for an affidavit to support the issuance of a search warrant where the affidavit is based upon hearsay from an unidentified informant.

First, the "underlying circumstances" must be set forth to enable the magistrate to independtly ascertain the validity of the informant's conclusion that a crime was committed.

Second, the "underlying circumstances" that enabled the affiant to conclude the informant was "credible" or the information "reliable".

The United States conceded that the "affidavit does not meet the *Aquilar standards.*" The reason is obvious. Each pertinent paragraph is based on hearsay without setting forth the "underlying circumstances"/(1) An automobile was reported stolen (a conclusion). The Circuit Court of Appeals made the further conclusion that this is "official verification of the *fact* of a crime." (2) A "responsible citizen" reported to an agent (not the affiant) of an attempt to obtain an Ohio Certificate of title (a conclusion).

The United States contended that the affidavit, while not meeting the requirements of *Aquilar* met the *Spinelli* requirements by providing probable cause because the serial number was set forth in both paragraphs. It can be pointed out that the serial number can readily be seen from outside the automobile by looking through the front windshield on the driver's side. Would the argument be the same if instead of the serial number, the color was set forth? Without the "underlying circumstances", the conclusion of a reported stolen vehicle and without any information whatsoever as to the informants, leaves too many questions unanswered. Who reported the vehicle stolen and to whom? In the third paragraph, the affiant sets forth clearly that "an officer of the Police Department of the City of Wheeling, Ohio County, West Virginia, reported" the back end of an automobile. Would he not have done the same if the report from Pittsburgh had been official? As set forth in the first paragraph, the conclusion is at least triple hearsay and as set forth in the second paragraph the conclusion is at least double hearsay, particularly when it is kept in mind the agent's (affiant) entire affidavit was without the benefit of any personal knowledge.

There is not one modicum of information set forth as "underlying circumstances" to permit the magistrate to draw an independent judgment as to the credibility or reliability of the informant or informants.

The United States suggested the serial number provided the basis for the "underlying circumstances". If the petitioner understands the argument, the unknown Pittsburgh informant provides the serial number and the unknown Ohio informant provides the serial number independtly. Therefore, since the numbers are the same, the informant, must be reliable. The

petitioner submits: Could it have been the same person? Did the Pittsburgh informant phone the Ohio informant, whoever they may be? The point is, there is no information as to the unknown informant or informants. Both paragraphs must meet the requirements of *Aquilar*. It becomes pure speculation and it is just such lack of information that this Court made reference to in footnote 4 of the *Aquilar* decision at page 114.

> "To approve this affidavit would open the door to easy circumvention of the rule announced in *Nathanson* and *Giondenello*. A police officer who arrived at the "suspicion", "belief", or mere "conclusion" that narcotics were in someone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure the warrant by swearing that he had "received reliable information from a credible person" that the narcotics were in someone's possession."

The United States admitted that the information from the "responsible citizen" could not meet the *Aquilar* tests. It then attempted to follow *Spinelli* by looking for support from the report from Pittsburgh. Where this argument fails is that that information contained in the supporting paragraph comes from a completely unidentified source which in itself must meet the tests of *Aquilar*. Since the paragraph the United States chose also fails to meet the *Aquilar* standards, the United States has not proceeded from *Aqutlar* to *Spinelli*, but rather it has never left *Aquilar*.

It is suggested that this case presents a clear opportunity to fully and finally explicate the principles of *Aquilar*.

Respectfully submitted,

/s/ Jeremy C. McCamic
Of Counsel for Petitioner

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FOR THE

United States District Court

FOR THE FOURTH CIRCUIT

No. 71-1280

United States of America,

Appellant,

v:

Eugene H. Roman,

Appellee.

Appeal from the United States District Court for the North District of West Virginia, at Elkins. Robert E. Maxwell, District Judge.

(Argued June 11, 1971 Decided November 17, 1971.)

Before Bryan, Winter and Russell, Circuit Judges.

James F. Companion, Assistant United States Attorney, (Paul C. Camilletti, United States Attorney, on brief) for Appellant, and Jolyon W. McCamic (McCamic and McCamic on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

A warrant directed to an FBI agent for a search of the garage and basement of appellant Eugene H. Roman's home in Wheeling, West Virginia for a stolen automobile was quashed, and the car seized under the warrant was rejected as proof in the prosecution of Roman for interstate auto theft under 18 USC § 2313. The ruling followed from the conclusion that the FBI agent's affidavit for the warrant, when judged under the Fourth Amendment's requirement of "probable cause", was insufficient to support the writ. We see the warrant as adequately grounded and vacate its dismissal.

The affidavit as pertinent reads:

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as the garage and basement of a two-story frame house located at 889 Ivy Avenue, Wheeling, Ohio County, West Virginia, in the Northern Judicial District of West Virginia, there is now being concealed a certain property, namely, a 1970 Chevrolet automobile, VIN 13637OA119308, reportedly stolen from James Bertuca, 4713 Hatfield Street, Pittsburgh, Pennsylvania, which is property constituting evidence of a federal crime, namely violation of Title 18, Section 2313, United States Code.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"The aforesaid 1970 Chevrolet automobile, VIN 13637OA119308, was reported stolen in Pittsburgh, Pennsylvania, on or about March 17 or 18, 1970.

"In July, 1970, a responsible citizen reported to an agent of the Federal Bureau of Investigation, Cincinnati office, that one Gene Roman endeavored to obtain an Ohio Certificate of Title for the 1970 Chevrolet automobile, VIN 13637OA119308, reported stolen as stated aforesaid.

"An officer of the Police Department of the City of Wheeling, Ohio County, West Virginia reported that he saw the back end of a 1970 Chevrolet automobile in the garage of the house located at 889 Ivy Avenue, Wheeling, West Virginia.

"The Wheeling City Directory lists that Eugene H. Roman is a resident of the premises situated at 889 Ivy Avenue, Wheeling, West Virginia."

The Fourth Amendment's exactions of the affidavit for a search warrant are set forth precisely in *Aquilar v. Texas*, 378

US 108 (1964). Cf. *United States v. Ross*, 424 F2nd 1016 (4 Cir. 1970). When based solely on the hearsay report of an unidentified informant, the affidavit must under the tenets of *Aquilar* recite "some of the underlying circumstances from which the officer concluded that the informant . . . . was 'credible' or his information 'reliable'", 378 US at 114. See also United States v. Harris, 403 US 573 (1971); Spinelli v. United States, 393 US 410 (1969).

Presently the United States concedes that the affidavit's *form* does not "meet the *Aquilar* standard" in that it fails to supply the grounds for the veracity accorded the informer. Nonetheless, it vigorously emphasizes that the very circumstances detailed in the affidavit inherently give credence to belief in Roman's guilt. See Spinelli v. United States, supra, 393 US at 415. To us this is the inescapable impartation of the affidavit — its very essence. In sum, the internal content of the affidavit intrinsically proves the truth of the "responsible" citizen's word.

Notably, informant's report to the agent about application for the car's titling described the vehicle by the precise engine number. He would not have had this information without intimate knowledge of the application document — a fact which forcefully enhances the probity of the affidavit. Significance of the informer's knowledge of the car number is questioned by Roman in that the informer could have been the same person who reported the car's larceny. He would, the argument continues, of course know the number. But this is only the appellee's guess the record does not establish the surmised duplication of identity, and nothing in the affidavit warrants an inference of this nature.

Adding the final imprimatur of believability to the citizen's disclosure is the affidavit's advertence to the Wheeling policeman's report that he saw "the back end of a 1970 Chevrolet automobile in [Roman's] garage". This was the fruit of police vigilance. The trustworthiness of the citizen's tip is further underwritten by indemppendent official verification of the *fact* of a crime, the theft of a car explicitly identified. Finally, the agent's own knowledge and assessment of the reliability of his source of information is not without significance. United States v. Harris, 403 US 573 (1971).

The lesson of *United States v. Ventresca*, 380 US 102, 108 (1965) is instuctive here:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants . . . must be tested and interpreted . . . . in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." 380 U.S. at 108.

In fine, of course, we recognize that the ipse dixit of the agent as to the informant's responsibility is not alone sufficient for the issuance of the warrant. But here the information embraced more than the informer's words denoted. It bears characteristics of its truth. It proves its own integrity, aside from the agent's appraisal.

We reverse the order discharging the warrant and discarding the evidence it brought.

Vacated.

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

v.

EUGENE H. ROMAN

Criminal No. 70-192-E

MEMORANDUM ORDER

* * *

Motion to Suppress

The defendant assigns four grounds in seeking to quash the search warrant in this case. He urges that it was issued without probable cause, that the facts set forth as probable cause in the search warrant were unlawfully obtained, that the facts by which probable cause was predicated were obtained by an unlawful search of defendant's premises, and that the search and seizure was unreasonable within the meaning of the Fourth Amendment, because the defendant was compelled to give evidence against himself in violation of the Fifth Amendment.

The affidavit for a search warrant was executed by a Special Agent of the Federal Bureau of Investigation, before a United States Commissioner, on September 16, 1970.

The critical paragraph of the affidavit is as follows:

> "In July, 1970, a *responsible citizen* reported to an agent of the Federal Bureau of Investigation, Cincinnati office, that one Gene Roman endeavored to obtain an Ohio Certificate of Title for the 1970 Chevrolet automobile . . . reportedly stolen as stated aforesaid."

The affidavit also alleges that the subject Chevrolet automobile was reported stolen on or about March 17 or 18, 1970; that an officer of the police department of Wheeling, West Virginia, reported that he saw the back end of a 1970 Chevrolet automobile in the garage at a house located at 889 Ivy Avenue, Wheeling, West Virginia; and that the Wheeling city directory

lists that Eugene H. Roman is the resident of the premises situated at 889 Ivy Avenue, Wheeling, West Virginia.

The question poised by the affidavit for a search warrant in this case may be stated as follows: Can the city directory location of an individual, coupled with a policeman's observation of "the back end of a 1970 Chevrolet automobile" and a report from "a responsible citizen" to a Federal Bureau of Investigation Agent in Cincinnati, constitute sufficient factual foundation for the issuance in this District of a search warrant for the recovery of stolen property, as is the circumstance in this case?

Aquilar v. *Texas*, 378 U.S. 108, at 114 (1964), teaches that:

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant, (citation omitted) the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officers concluded that the informant whose identity need not be disclosed (citation omitted), was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer' engaged in the often competitive enterprise of ferreting out crime,' (citations omitted) or, as in this case, by an unidentified informant."

In *Aquilar* the Supreme Court determined that the use of the term "affiants have received reliable information from a credible person and do believe . . ." was not adequate and the search warrant should not have been issued because the affidavit did not provide a sufficient base for a finding of probable cause and the evidence obtained was inadmissible at petitioner's trial.

In *Spinelli* v. *United States*, 393 U.S. 410 (1969) the affidavit for a search warrant advised in part that the Federal Bureau of Investigation had "been informed by a confidential reliable informant," that the defendant was engaged in gambling operations. At page 413 it is pointed out that "[n]ot only does

it (the search warrant affidavit) contain a report from an anonymous informat, but it also contains a report from an independent FBI investigation which is said to corroborate the informant's tip."

The Supreme Court at page 416 concluded:

"Though the affiant swore that his confident was 'reliable' he offered the magistrate no reason in support of this conclusion."

At page 418 the Supreme Court found as follows:

"We conclude, then, that in the present case the informant's tip , — even when corroborated to the extent indicated — was not sufficient to provide the basis for a finding of probable cause. This is not to say that the tip was so insubstanital that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to the other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed."

On the other hand, there can be no doubt that an affidavit in support of a search warrant can in large measure be based upon hearsay, but it must be corroborated at least to a substantial extent with the knowledge of the affiant as to the critical aspects of the matters alleged in the search warrant affidavit. "The hearsay information came to him from different sources and so dovetailed as to present within itself corroboration. It disclosed probable cause for the search which the warrant authorized." *United States* v. *Crews*, 326 F. 2nd 755 (4th Cir. 1964), *cert. denied*, 377 U.S. 955 (1964).

In the case presently before this Court for consideration we have the information to affiant by an officer of the police department of the City of Wheeling. He saw the back end of the 1970 Chevrolet automobile in the garage of defendant's house, or at least a house listed in the Wheeling city directory as that of the defendant. This is credible hearsay evidence. This is evidence that in part contributes to a valid affidavit for a search

warrant. The question then is whether this hearsay information, plus the hearsay information from an unidentifed source, that a 1970 Chevrolet Automobile was reported stolen in Pittsburgh, Pennsylvania, and the further hearsay evidence that "a reponsible citizen" reported that the defendent endeavored to obtain a certificate of title, is adequate for the issuance of a search warrant.

The Court must conclude in this instance that the record of a reported stolen automobile in Pittsburgh, Pennsylvania, is conclusionary and, as expressed and stated on the face of the affidavit seeking a search warrant, is not an adequate factual description upon which a magistrate can act as required under this area of law. The reported observation by a member of the police department of the City of Wheeling, while hearsay, is adequately factual and dependable under the case law in this area, but the third element of this affidavit for a search warrant, namely the hearsay evidence from "a responsible citizen" is conclusionary and is not sufficiently factual under the law above cited, upon which a magistrate can base the issuance of a search warrant.

Upon consideration of all of the matters discussed under the defense motion to suppress, it is accordingly ADJUDGED and ORDERED that said motion to suppress is sustained.

ENTER: January 20th, 1971.

United States District Judge